

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RUHT TOVAR

Claimant

VS.

HEARTHSTONE RETIREMENT COMMUNITY

Respondent

AND

NATIONAL UNION FIRE INSURANCE CO.

Insurance Carrier

Docket No. 170,409

ORDER

The application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey, on June 14, 1994, came on for oral argument by telephone conference.

APPEARANCES

Claimant appeared by her attorney Mitchell Wulfekoetter of Topeka, Kansas. Respondent and insurance carrier appeared by their attorney Matthew S. Crowley of Topeka, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Special Administrative Law Judge is herein adopted by the Appeals Board.

Stipulations

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) The nature and extent of claimant's injury and disability.
- (2) Whether the respondent should be reimbursed for an overpayment of temporary total disability compensation.

Findings of Fact and Conclusions of Law

Claimant worked for respondent as a CNA. On April 28, 1992, while attempting to catch a falling patient, claimant was injured, suffering an immediate onset of pain in her right arm and shoulder. She did not obtain medical treatment on that date, but did go to her own personal doctor, Dr. Jeffrey Rhoads, the next day. Dr. Rhoads sent her to physical therapy at St. Francis Hospital. St. Francis then referred her to Dr. Polly, Dr. Payne, Dr. Schmidt and Dr. Wilson. Dr. Payne gave her a shot in the elbow. She was also treated by Dr. Grulick and Dr. Ruggles.

Dr. Rhoads, a general internal medicine physician, first examined claimant April 30, 1992. Claimant presented a history of suffering an injury to her right arm while attempting to catch a resident at Hearthstone Retirement Community. He took claimant off work as of April 30, and she remained off work until May 18, 1992 when she returned to light duty at her second job at Econo-Clad. He recommended therapy through Kansas Rehabilitation Hospital. During his examination of claimant he found complete movement in the right arm above the shoulder level with full range of motion at the elbow and shoulder level. He did not personally rate claimant or provide work restrictions, but did not object to the eight percent (8%) functional impairment provided claimant by Dr. Payne and did not object to Dr. Payne's five (5) pound right upper extremity lifting restriction with a ten (10) pound limit for both hands.

Claimant was seen by Dr. John L. McGovern, an emergency room physician, at St. Francis Hospital on June 14, 1992. The claimant's symptomatology and history of injury were consistent. Dr. McGovern noted tenderness in claimant's lateral epicondyle of the elbow and the back of the right shoulder. She was continued in her off duty status with the next exam being July 1, 1992, at which time her shoulder had improved. She did have continued tenderness in the right arm. Claimant was on light duty at her second job at Econo-Clad. Dr. McGovern placed claimant under temporary restrictions of no lifting of more than ten (10) pounds with limited pushing and pulling. At claimant's next exam on July 30, she exhibited less tenderness, less swelling and an improved grip. She was continued on light duty at Econo-Clad until December 2, 1992. Claimant was unable to return to her work at Hearthstone with the medical limitations imposed.

On August 9, 1992 Dr. McGovern reimposed the five (5) pound weight restriction as claimant was unable to withstand the ten(10) pound limitation placed upon her earlier. The five (5) pound limitation, including limited pushing, lifting and pulling, continued through the next exam on September 30, 1992. This was Dr. McGovern's last examination of claimant. Dr. McGovern was also aware of Dr. Payne's eight percent (8%) whole body functional impairment and the five (5) pound lifting limitation. He concurred, although he testified that he does not normally provide work restrictions or do impairment ratings. Dr. McGovern did request an arthrogram on claimant's shoulder, which was normal. He had nothing more to offer claimant.

Claimant began treatment with Dr. Robert R. Payne, a board certified orthopedic surgeon on July 20, 1992, as the result of a referral by Dr. McGovern. Claimant's history of injury to the doctor was consistent. In his exam on July 20, Dr. Payne found claimant to have discomfort in her right elbow, but her shoulder was improved. She had a full range of motion in her right shoulder with complaints of pain in the supraspinatus and right biceps area, as well as the suprascapular area, which includes the rotator cuff and the point of the shoulder deep in the deltoid muscle. She also had tenderness over the lateral aspect of the epicondyle in the right elbow. Claimant had pain during hand grip and wrist extension testing. The doctor reviewed x-rays and ultimately diagnosed a resolving right shoulder strain with elements of rotator cuff tendinitis. He also diagnosed lateral epicondylitis in the elbow which was not improving. He recommended she not work at Hearthstone, which was consistent with the opinions of the other examining physicians. During his next exam on July 27, 1992 he found claimant's discomfort to be less, although she still exhibited tenderness over the lateral epicondyle and had discomfort with dorsiflexion of the wrist.

She was having some trouble with the shoulder but it was improving. Claimant was provided a forearm cuff. She was also being treated with Ibuprofen, range of motion exercises, strengthening exercises for the elbow and was continued off work from Hearthstone.

Dr. Payne attempted, unsuccessfully, to return claimant to work at Hearthstone on September 21, 1992, at light duty. When Dr. Payne examined claimant on October 23, 1992, he found a full range of motion in the shoulder with no crepitation. She did have pain in the shoulder with abduction and external rotation against resistance, as well as pain in the medial and lateral epicondyle of the elbow. He assessed claimant an eight percent (8%) whole body functional impairment for the injuries to her upper right extremity, based upon her subjective complaints. Claimant was originally provided a ten (10) pound lifting restriction which she was unable to tolerate. That limitation was then reduced to five (5) pounds lifting to the right upper extremity. This would involve a ten (10) pound lift with both arms, with a five (5) pound limitation at or above shoulder level. He opined claimant could repetitively use her upper extremity only occasionally, meaning one-third (1/3) of the day or less. Dr. Payne was aware claimant was doing a modified job at Econo-Clad and had no objection to claimant's continuation in that employment.

Temporary total disability compensation is awarded when an employee is temporarily and totally incapable of performing substantial and gainful employment. See K.S.A. 510c(b)(2). Claimant was taken off work April 30, 1992, and by her own testimony, returned to employment at Econo-Clad on May 18, 1992. This would indicate that claimant was temporarily totally disabled and entitled to benefits for a period of nineteen (19) days or 2.71 weeks. Claimant was paid 25.29 weeks temporary total disability compensation at the rate of \$135.13 per week based upon an average weekly wage of \$225.20 in the total sum of \$3,417.44. The Appeals Board finds this represents an overpayment of temporary total disability compensation to the claimant.

The Appeals Board finds claimant is entitled to 2.71 weeks temporary total disability compensation at the rate of \$135.13 per week with any overpayment credit due the respondent in the final Award, pursuant to K.S.A. 44-525(b).

In proceedings under the Workers Compensation Act, the burden of proof shall be on the claimant to establish claimant's right to an award of compensation by proving the various conditions upon which the claimant's right depends by a preponderance of credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g); see also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

K.S.A. 1991 Supp. 44-510e(a) defines functional impairment as follows:

“Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence.”

Claimant has been assessed an eight percent (8%) whole body functional impairment by Dr. Robert Payne with this functional impairment being ratified by Dr. Jeffrey Rhoads and Dr. John L. McGovern, Jr. The Appeals Board finds claimant has suffered an eight percent (8%) whole body functional impairment as a result of the injuries to her right upper extremity and shoulder on April 28, 1992.

K.S.A. 1991 Supp. 44-510e(a) goes on to state:

“There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable

to the average gross weekly wage that the employee was earning at the time of the injury.”

Claimant has returned to work at Econo-Clad at an average weekly wage which is equal to or greater than that earned by claimant with Hearthstone. Nevertheless, claimant's access to her open labor market and her ability to earn comparable wages has been dramatically affected by the injuries suffered at Hearthstone. Claimant attempted to return to work at Hearthstone and was unable to successfully do so. Hearthstone was unable to meet the restrictions placed upon claimant by her treating physicians. As such, the Appeals Board finds that the presumption contained in K.S.A. 1991 Supp. 44-510e has been overcome, and claimant is entitled to work disability in this instance.

Claimant continues working at Econo-Clad as a cover line operator at an average weekly wage that exceeds that which she was earning with respondent, at the time of the injury. Econo-Clad's Human Resources Manager, Mr. Michael L. Redmond, testified that, although they do not normally offer light duty to employees not injured at Econo-Clad, he felt that claimant was a well-qualified employee and, in her case, they made an exception. By the time Mr. Redmond's deposition was taken April 23, 1993, claimant had been returned to full duty, although her job duties had been somewhat modified. Claimant's medical restrictions currently did not prevent her from performing full duty at Econo-Clad.

K.S.A. 1991 Supp. 44-510e(a) states in part:

“The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment.”

Claimant was referred to Mr. Jerry Hardin for an assessment of her loss of access to the open labor market and loss of ability to earn comparable wages stemming from the injuries suffered at Hearthstone. Mr. Hardin, in his evaluation, found claimant to have suffered a seventy-five to eighty percent (75-80%) loss of ability to perform work in the open labor market. As the Appeals Board has found claimant to be entitled to work disability and as Mr. Hardin's testimony is uncontradicted, the Appeals Board finds claimant has suffered a seventy-seven and one-half percent (77.5%) loss of ability to perform work in the open labor market.

Mr. Hardin went on to testify claimant has retained the ability to earn \$244.00 per week, which, when compared to claimant's average weekly wage of \$225.20 per week convinces the Appeals Board claimant has not lost the ability to earn comparable wages at this time. As such, the Appeals Board finds claimant's loss of ability to earn a comparable wage is zero (0).

In determining the extent of permanent partial disability, both the reduction of claimant's ability to perform work in the open labor market and her ability to earn comparable wages must be considered. In Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), the Supreme Court, while indicating a balance of the above factors required, does not specifically state how this balance is to occur or what emphasis is to be placed upon each of the tests. In arriving at a percentage of claimant's work disability, a mathematical equation or formula must be utilized. Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). The statute requires a balancing of the two elements of claimant's work disability but does not give indication as to how much weight should be given to either. The Appeals Board finds

no compelling reason to place greater emphasis on one factor over the other. As such, the Appeals Board finds equal emphasis should be given to claimant's ability to perform work in the open labor market and ability to earn comparable wages. In so computing, the Appeals Board finds claimant's seventy-seven and one-half percent (77.5%) loss of access to the open labor market when compared to a zero percent (0%) loss of ability to earn a comparable wage, equates to a work disability of thirty-eight and three-fourths percent (38.75%) and awards same.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey of June 14, 1994, shall be and is affirmed in part, and reversed in part, in that the claimant, Ruht Tovar, is hereby awarded compensation against the respondent, Hearthstone Retirement Community and its insurance carrier, National Union Fire Insurance Company of New York, for an injury occurring on April 28, 1992, for 38.75% permanent partial general body work disability. Claimant is entitled to 2.71 weeks temporary total disability compensation in the amount of \$150.14 per week totaling \$406.88 followed thereafter by 412.29 weeks of permanent partial general body work disability at the rate of \$58.18 per week in the amount of \$23,987.03 for a total award of \$24,393.91.

As of September 15, 1995, claimant would be entitled to 2.71 weeks temporary total disability compensation at the rate of \$150.14 per week totalling \$406.88 followed thereafter by 173.72 weeks of permanent partial disability compensation at the rate of \$58.18 per week in the sum of \$10,107.03 for a total of \$10,513.91 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$13,880.00 is to be paid for 238.57 weeks at the rate of \$58.18 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of October, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mitchell Wulfekoetter, Topeka, Kansas
Matthew S. Crowley, Topeka, Kansas
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director